In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 355

SANFORD E. ADAY, WALLACE DE ORTEGA MAXEY, AND WEST COAST NEWS COMPANY, INC., A CALIFORNIA CORPORATION, PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, AND NOEL P. FOX, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals dismissing the petition for mandamus (R. 95–102) is reported at 318 F. 2d 588. The opinion of the district court (R. 51–76) is reported at 216 F. Supp. 911.

JURISDICTION

The order of the court of appeals was filed on June 12, 1963. By order of Mr. Justice Stewart, dated

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July 2, 1963, the time for filing a petition for a writ of certiorari was extended to and including August 11, 1963. The petition was filed on August 9, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a writ of mandamus should issue to require the district court to vacate its order striking and denying petitioners' motion to dismiss the indictment against them by reason of the composition of the grand jury which returned it.

STATEMENT

Petitioners were indicted on May 24, 1960, charged in 19 counts with violation of 18 U.S.C. 1461 and 1462 (mailing and transportation of obscene matter) (R. 22–32). On August 15, 1960, they filed a motion pursuant to Rule 21(b), F.R. Crim. P., to transfer the case to the United States District Court for the Southern District of California (R. 108). The motion was denied on February 13, 1962 (30 F.R.D. 13), and petitioners were arraigned on March 2, 1962 (R. 140–149). On March 30, 1962, they filed a motion to dismiss the indictment because of alleged invalidity in the selection of the grand jury (R. 33–35).[1] On December 3, 1962, they filed a motion for renewal and reargument of their motion to transfer, claiming an intervening change both in the law and in their situation. On March 12, 1963, the United States filed a motion to strike petitioners' motion challenging the

[1] They also filed a motion to dismiss upon other grounds and a motion for a bill of particulars.

selection of the grand jury, on the ground that it was untimely (R. 36–37). All motions were argued on March 13, 1963, and evidence in support of petitioners' motion relating to the grand jury was taken on March 13 through March 15 (R. 150–526).[2] On March 29, the district court entered an order granting the motion of the United States to strike petitioners' motion attacking the selection of the grand jury and denying the various motions of petitioners. (R. 48–49).

On April 19, 1963, the district court filed an opinion in support of its order (R. 51–76; 216 F. Supp. 911). So far as the grand jury aspect was concerned, it found an implied waiver of petitioners' challenge to the array because they failed to assert their claim prior to indictment (although they knew that the grand jury was considering charges against them) and because their initial motion to transfer, if granted, would have precluded their later challenge to the array. The court also found an express waiver

[2] The gist of petitioners' attack on the grand jury was a contention that the persons whose names were placed in the jury box constituted a disproportionate reflection of what they asserted were the various classes residing in the Western District of Michigan, Southern Division, and a contention that the jury officials made no inquiry concerning the qualifications of such persons before their names were placed in the box (some 1200 to 1400 names were placed in the box initially, and replenishments over a five year period brought the total placed therein to some 4000 names). They offered as witnesses the clerk and the jury commissioner, who testified to the procedures used to fill the box, and a doctor of sociology and anthropology, who, on the basis only of the names drawn from the box (and in some instances not all of the names), testified in essence that the selection was not sufficiently random to meet the standards of research methodology (R. 234–235, 239).

to the challenge in the statement by their counsel on August 15, 1960, during argument on the original motion to transfer, that "[w]e are not asking this court to quash the indictment".[3] In addition, the court stated: "For purposes of thoroughness, the court feels it proper to here state in its opinion that the attack on the array, on its merits, is not well taken * * * and I find as a matter of fact that the defendants have failed to meet their burden of proof" (R. 65; 216 F. Supp. at 921).[4]

Petitioners thereupon simultaneously sought mandamus in this Court to vacate that part of the district court order which denied their motion to transfer, and mandamus in the court of appeals to vacate that part of the order which denied their motion to dismiss. This Court denied leave to file a petition for a writ of mandamus on June 17, 1963. 374 U.S. 823. The court of appeals dismissed their petition to that court on the ground that they were seeking "an interlocutory appeal" prior to "final adjudication of the case on its merits in the District Court", and that "[t]his case is not such as to require the use of the extraordinary writ of mandamus" (R. 102; 318 F. 2d at 591).

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[3] Among the cases cited by the court in support of its holding of untimeliness were *Agnew* v. *United States*, 165 U.S. 36; *Cook* v. *United States*, 4 F. 2d 517 (C.A. 5, 1925); *Poliafico* v. *United States*, 237 F. 2d 97 (C.A. 6, 1956); *Wolfson* v. *United States*, 101 Fed. 430 (C.A. 5, 1900); and *Wagner* v. *United States*, 67 F. 2d 656 (C.A. 9, 1933).

[4] In support of this holding, the court cited *United States* v. *Dennis*, 183 F. 2d 201 (C.A. 2, 1950), affirmed, 341 U.S. 494; *Thiel* v. *Southern Pacific Company*, 328 U.S. 217; *Ballard* v. *United States*, 329 U.S. 187; and *Poliafico* v. *United States*, *supra*.

ARGUMENT

The district court exercised its authority and came to a full determination on the merits of the motion attacking the selection of the grand jury. As the court observed, timeliness is a matter of substance. Compare *Hyde* v. *United States*, 225 U.S. 347, 373; *Wagner* v. *United States*, *supra*, 67 F. 2d at 657. Moreover, the court also found that petitioners had failed to carry their burden of proof on the merits—a determination made after a three-day hearing.[5] There is plainly no contradiction to be found in the fact that the district court rested on alternative holdings, concluding that the challenge was both untimely and lacking in merit. Cf. *United States* v. *Shotwell Manufacturing Company*, 287 F. 2d 667, 673 (C.A. 7, 1961), affirmed, 371 U.S. 341; *Scales* v. *United States*, 260 F. 2d 21, 45 (C.A. 4, 1958), affirmed, 367 U.S. 203; *Agnew* v. *United States*, *supra*; *Wagner* v. *United States*, *supra*.

[5] Contrary to petitioners' assertion (Pet. 29), there was no further evidence to be presented that was relevant to their burden of proof. The lack of necessary evidence in the record concerning the identity and description in regard to age, occupation, etc. of all of the persons whose names were in the jury box was due solely to petitioners' failure to develop such information in timely fashion (see R. 450–451). The other additional evidence to which petitioners allude (see Pet. 9–10) was merely cumulative. Additional briefing and proposed findings of fact and conclusions of law were, of course, discretionary with the district court, and, in point of fact, petitioners' attorney submitted to the district court, prior to the issuance of its opinion, a lengthy letter containing legal argument (R. 39–47) which served the function of a brief on the question of timeliness.

As the court of appeals correctly held, mandamus is not available to obtain review of an interlocutory order which is unappealable prior to final judgment. *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 27; *Parr* v. *United States*, 351 U.S. 513, 520–521. If there was any error in the determination made by the district court (which we deny), the matter may be reviewed in the event of an ultimate conviction. It is "only where appeal is a clearly inadequate remedy" that the "drastic and extraordinary" remedy of mandamus, which has "the unfortunate consequence of making the judge a litigant," may be employed. *Ex parte Fahey*, 332 U.S. 258, 259–260.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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